PP

v.

MOHD SAIRI ABDUL SAMAT

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
AZIAH ALI JCA
MOHTARUDIN BAKI JCA
[CRIMINAL APPEAL NO: W-05-243(B)-2009]
28 JUNE 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Offence of drug trafficking - 5,464g of cannabis - Acquittal - Appeal against - Drugs found underneath bed in unlocked room - House keys found in accused's pocket at time of arrest - Whether accused had sole access to room - Room accessible to friends - Mere occupation of room - Whether sufficient to prove custody, control and possession - Failure to prove knowledge of drugs - Mere knowledge of presence of drugs in room - Whether sufficient*

One ASP Zulkefli ('SP4') and his team had apprehended the respondent who was in a motorcar. SP4 conducted a body search on the respondent and recovered one plastic package containing cannabis from the respondent's trousers' pocket. SP4 also recovered two keys from the right front pocket of the respondent's trousers. From the pocket of the door on the driver's side of the car, SP4 recovered one package wrapped in newspaper which contained cannabis. SP4 testified that as a result of interrogation of the respondent, they went to a house and using the keys recovered from the respondent they had opened the front doors to the house. SP4 stated that they entered an unlocked room which had two beds. According to SP4, pursuant to interrogation of the respondent, SP4 retrieved from underneath one of the beds, a bag containing cannabis. The respondent was charged with three offences under the Dangerous Drugs Act 1952 ('the DDA'). He was charged for an offence under s. 39B(1)(a) of the DDA with trafficking in 5,464g of cannabis. He was also charged for offences under s. 39A and s. 12 of the same Act, respectively. The defence case was that the respondent did not have sole access to the room. According to the respondent, the room was also occupied by his two brothers and accessible to his friends and his brothers' friends whenever they came to the house. He allowed his close friends to sleep in the room whenever they stayed overnight. The trial judge found that the appellant did not have sole access to the room and accepted the appellant's denial of knowledge of the drugs in the room as probably true. Consequently, the respondent

A was acquitted and discharged of the offence under s. 39B of the DDA but was convicted under s. 39A and s. 12 of the same Act. The prosecution appealed against the decision to acquit and discharge the respondent of the offence under s. 39B.

B **Held (dismissing appeal):**

(1) Even though it was established that the respondent was the occupier of the room, mere occupation of the room *per se* was insufficient to prove custody and control and possession of the drugs. The respondent's family members, his friends and his brothers' friends C also had access to the room. The respondent not only did not have sole access to the room but he probably did not have sole access to the cupboard too. Hence, there was insufficient evidence to find that the respondent had custody and control of all the packages recovered from his room. Even if there was proof of custody and D control, it would not be sufficient to establish possession. The prosecution had to establish beyond reasonable doubt that the respondent had not only custody and control but also knowledge of the drugs, but knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute E possession, let alone trafficking; *Gooi Loo Seng v. PP* (refd); *Ibrahim Mohamad & Anor v. PP* (refd). (paras 13 & 14)

(2) Knowledge of the place where the drugs were hidden did not necessarily constitute possession by the respondent unless there was further evidence produced by the prosecution that it was the F respondent who had hidden the drugs there. At most, it showed that he had knowledge where the drugs were kept or concealed; *Yee Ya Mang v. PP* (refd). (para 16)

(3) The evidence did not show what was the true substance of the information given by the respondent to SP4. There was no clear G evidence that SP4 had recovered the drugs because the respondent had told him that he had hidden the drugs in the room. Thus, there was doubt as to whether the respondent had custody and control of the drugs and he had concealed them in the room or whether he merely had knowledge of the presence of the drugs in the room. H (para 17)

(4) The defence raised by the respondent was reasonable and probable and sufficient enough to rebut the presumption under the DDA. (para 18)

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Case(s) referred to:
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ Rep 43 SC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ Rep 265 SC ***(refd)***
PP v. Khoo Boo Hock & Anor [1990] 1 CLJ 971; [1990] 2 CLJ (Rep) 716 HC ***(refd)***
Yee Ya Mang v. PP [1971] 1 LNS 156 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12, 37(d), 37(da), 39A, 39B(1)(a)

For the appellant - Lailawati Ali; DPP
For the respondent - Mohd Ridzuan Muhamad; M/s Mohd Fadzli & Co

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-34-2007]

Report by Amutha Suppayah

JUDGMENT

Aziah Ali JCA:

[1] The respondent, Mohd Sairi bin Abdul Samat was charged with three offences under the Dangerous Drugs Act 1952 ('the DDA'). He was charged for an offence under s. 39B(1)(a) with trafficking in 5,464g of cannabis, a dangerous drug as defined under s. 2 of the DDA. He was also charged for two other offences under s. 39A and s. 12 respectively. At the conclusion of the trial the respondent was acquitted and discharged of the offence under s. 39B but was convicted on the two charges under s. 39A and s. 12. He was sentenced to 16 years' imprisonment and ten strokes of the rotan for the offence under s. 39A and to one year's imprisonment for the offence under s. 12.

[2] The Public Prosecutor appealed to this court against the decision of the High Court to acquit and discharge the respondent of the offence under s. 39B whilst the respondent appealed against the sentences imposed upon him for the offences under s. 39A and s. 12. We heard the appeals simultaneously. Having considered the appeal records and submissions of learned Deputy Public Prosecutor ('DPP') and learned assigned counsel for the respondent, by a unanimous decision we dismissed the Public Prosecutor's appeal against the decision of the High Court to acquit and discharge the respondent in respect of the offence under s. 39B and we also dismissed the respondent's appeal against the

A sentences imposed by the High Court. The Public Prosecutor is dissatisfied with our decision in affirming the decision of the High Court to acquit and discharge the respondent of the offence under s. 39B.

Background Facts

B **[3]** The salient facts showed that on 16 December 2006 at about 10.30pm SP4, ASP Zulkefli bin Kamis and six other members of his team including SP6, D/Cpl Zainal bin Hasan conducted a surveillance on a house No. 51A-5, Pintasan Raja Muda Musa 4, Kg Baru, Kuala Lumpur when at about 11pm they saw a green-coloured Proton Satria C motorcar stopped under a garage next to the said house. The motorcar was driven by the respondent with Muhamad Isha bin Mukisan (SP8) as passenger. SP4 and his team members approached the motorcar. SP4 together with SP6 pulled the respondent out of the vehicle while two other team members pulled out SP8. According to SP8 when he and D the respondent arrived at the respondent's house, he got out of the car and someone identified himself as the police and pushed him back into the car. He was asked whether he was 'Sairi' and he replied that he was not. Then the police checked the car and the respondent and drugs were found inside the car and on the respondent.

E **[4]** A body search on the respondent was conducted by SP4 and from the rear left pocket of the trousers worn by the respondent (exh. P17) he recovered one plastic package containing compressed dried leaves suspected to be cannabis. SP4 also recovered one Nokia handphone (exh. P28) and two keys from the right front pocket of the F trousers worn by the respondent (exh. P29A & B). A body search conducted on the passenger SP8 revealed nothing incriminating.

[5] An inspection of the car was carried out and from the pocket of the door on the driver's side SP4 recovered one package wrapped in Malay language newspaper inside which was compressed dried leaves G suspected to be cannabis wrapped in transparent plastic. Underneath the passenger seat SP4 recovered one 500ml 100 Plus bottle (exh. P20F) containing dark coloured liquid suspected to be cough mixture. The aforementioned facts formed the basis for the charges under s. 39A and s. 12 preferred against the respondent.

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[6] In respect of the facts which are relevant to this appeal, SP4 testified that as a result of interrogation of the respondent, he together with SP6 and the respondent went to the house and used the keys recovered from the respondent to open the iron grill door and the I wooden door to the house. SP4 and SP6 entered the house together

with the respondent. SP8 was left outside the house guarded by two other members of his team. There were two rooms in the house and both SP4 and SP6 together with the respondent entered one of the rooms (exh. P6F). The door to the room was not locked. In the room were two beds; a single bed and a double decker bed. Pursuant to interrogation of the respondent, SP4 retrieved from underneath the single bed one dark coloured bag with the name 'Timberland' (exh. P21). According to SP6 this bag was not visible upon entry to the room because it was concealed from view by the bed sheet. The bag was closed and SP4 opened the zip and inside the bag were five transparent plastic packages containing compressed dried leaves suspected to be cannabis. Four of the packages were tied with blue coloured tape and one package was tied with red coloured tape (exh. P5D, 5B, 5F, 5H and 5J). Again pursuant to interrogation of the respondent SP4 removed a drawer inside a cupboard and on the floor underneath the drawer SP4 recovered one transparent plastic package tied with red coloured tape (exh. P5L) also containing compressed dried leaves suspected to be cannabis. According to SP6 they would not have found this package without information from the respondent. SP4 then searched the other room which door was also not locked. He also searched the living room and the kitchen. Nothing was recovered. SP4 seized the items recovered and SP4 then closed the door of the room from where the packages were recovered. He locked the house and they all left for the Kuala Lumpur Police Contingent Headquarters. There SP4 weighed and marked the items seized. He then took the seized items and the respondent and SP8 to the Narcotics Office at the Dang Wangi Police District Headquarters where he handed the items seized and the respondent and SP8 to SP12, the Investigating Officer ('IO') Insp Suraya Hany Abd Rahim. Both SP4 and SP12 signed the Surat Akuan Serah Menyerah (exh. P15) in respect of items seized from inside the car and another form in respect of items seized from the house (exh. P16). On 19 December 2006 SP4, SP12 and the photographer SP2 visited the house where SP2 took photographs (exh. P6A-6F). SP12 also took four other photographs of the crime scene. At the Tun H S Lee Police Station he took three photographs of the Proton Satria car. At the office of the IO he took two photographs of the drugs (exhs. P7 & P13). Only he and the IO were present when exh. P7 was taken. According to the IO the Proton Satria car was registered in the name of one 'Encik Mahadi'. The contents of the six packages recovered from the room in the house were sent to the chemistry department. The chemist SP1 Shadiah bt Mohammad carried out an analysis and found the six packages contained a total of 5,464g of the dangerous drugs cannabis. SP1 prepared a report (exh. P4). These facts formed the basis for the charge under s. 39B.

A B C D E F G H I

[7] The prosecution called SP10 the respondent's brother who testified in cross examination that he occupied the room together with the appellant. They have another brother named Mohd Shahril who would also occupy the same room whenever he came to the house. SP10 testified that in the said room were kept things that belonged to him, the respondent and his other brother Shahril. The room was not locked and was accessible to all the occupants in the house. The appellant's friends would also occupy the same room when they stayed over. The respondent's mother, SP11 testified that there was only one key to the house and the appellant did not have any key to the house. She had gone to Cameron Highlands and had taken the house key with her. The house was left unlocked. She was not home when the police arrested the respondent.

Findings By The High Court

[8] The learned trial judge found that the prosecution had proved a *prima facie* case against the respondent and ordered the respondent to enter his defence. In his grounds of judgment the learned judge disbelieved the evidence of the respondent's mother that she had left the house unlocked to go to Cameron Highlands as nonsensical and unreasonable. In His Lordship's view the testimony of SP11 that she held the only key to the house and had left for Cameron Highlands leaving the house unlocked was for the purpose of creating a doubt on the testimony of SP4 that he had unlocked the door to the house using the key recovered from the appellant. His Lordship accepted the evidence of the appellant's brother SP10 that the respondent occupied the room from where SP4 recovered the drugs and this room was not locked. Despite the absence of direct evidence that it was the respondent who had kept the drugs in the room, His Lordship drew an inference that it must have been the respondent who had placed the drugs in the room because he was the occupier of the room. Therefore His Lordship found that the respondent had custody, control and knowledge of the drugs and that the prosecution had proved that the respondent had possession of the drugs. His Lordship did not rely on s. 37(d) for presumed knowledge. Based on the weight of the drugs His Lordship invoked the presumption of trafficking under s. 37(da) of the DDA.

The Defence Case

[9] The defence case was that the respondent (SB1) did not have sole access to the room. According to the respondent the room was also occupied by his brother SP10 and the other brother. The room was accessible to his friends and his brothers' friends whenever they came to the house. He allowed his close friends to sleep in the room

whenever they stayed overnight. When his friends slept in the room, his brother would sleep in their mother's room. One day prior to his arrest a friend of his by the name of 'Kamal' had stayed over at his house and slept in the said room. When he left for work at 7 am the next day to help his uncle who runs a restaurant at the weekly market, Kamal was still asleep. Kamal also had a restaurant business in Taman Samudera. He had borrowed the Proton Satria car from Kamal that evening in order to fetch his mother. The respondent denied that he did not inform the IO about Kamal. He denied that his story about Kamal was an afterthought. The bed under which the drugs were recovered was not the bed that he usually slept in. He slept on the other bed in the room.

[10] According to the respondent in the house he was asked by SP4 which of the two rooms was his room. He showed them his room and then members of SP4's team entered the room. Approximately ten minutes later he was brought into the room. In the room he saw that the condition of the room was disorderly with clothes left on the floor and the cupboard opened. One of the police personnel then showed him a bag under a bed and told him that the bag contained drugs. According to the respondent that was the first time that he saw the bag. He also saw something else under the cupboard's drawer. The respondent testified that he did not know the owner of the bag and neither did he know about the drugs. He denied that the drugs belonged to him. The respondent denied that the police recovered the house key from him. According to him the door to the house was not locked and the house key was with his mother.

[11] In evaluating the defence evidence the learned judge accepted the testimonies of the appellant's brother SP10 and his mother SP11 that the room occupied by the respondent was not locked and was accessible to other family members and to the respondent's friends who would lounge around in his room whenever they came to the house and were also allowed to stay overnight in the room. The learned judge found that the presence of more than one bed in the room was consistent with evidence that more than one person could sleep in the room at any one time. Further His Lordship also accepted the evidence that the respondent's family members also kept their things in the room. With regard to 'Kamal', His Lordship found that the respondent's testimony that his friend 'Kamal' had stayed overnight in the room was probably true. Based on evidence that the appellant did not have sole access to the room His Lordship found that the appellant's denial of knowledge of the drugs was probably true. Consequently the learned judge found that the prosecution had failed to prove its case beyond reasonable doubt and the respondent was thereupon acquitted and discharged.

A **The Appeal**

[12] Learned DPP submitted that the evidence showed possession *per se* and that the appellant knew of the existence of the drugs. His brother SP10 had denied knowledge of the drugs and the appellant's sister and the other brother were at the material time not residing in the house. It was submitted that the appellant's evidence about 'Kamal' was an afterthought because 'Kamal' was not mentioned during the prosecution's case. It was the DPP's submission that only the appellant who had occupied the room would hide the drugs there.

[13] We were of the view that even though it was established that the respondent was the occupier of the room, mere occupation of the room *per se* was insufficient to prove custody and control and possession of the drugs. In the case of *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 the appellant was charged under s. 39B(1)(a) of the DDA with trafficking in 22,469g of heroin which was found in his rented room. At the trial it was established that his girlfriend also had a set of keys to his room and that she had used the bedroom as her own, that she shared the same bed there with the appellant, on the average for one or two nights a week. The appellant's landlord testified that after the room was let to the appellant, his girlfriend who was introduced to the landlord as the appellant's wife, had also slept in the room. Edgar Joseph Jr SCJ in delivering the judgment of the Supreme Court said *inter alia*:

> ... even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there.

[14] Similarly in the present appeal there was evidence that the respondent's family members, his friends and his brother's friends also had access to the room. SP11 had testified that the respondent's brother had also kept his clothes in the respondent's room. We were of the view that even if the evidence regarding 'Kamal' was rejected, the prosecution had failed to exclude the possibility of others having access to the room and the cupboard. Custody implies knowledge of the existence and whereabouts of the goods and the power of control over them, not amounting to possession. In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53 Taylor J said:

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is

> taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and the power of control over them, not amounting to possession.

[15] The respondent not only did not have sole access to the room but he probably also did not have sole access to the cupboard. Hence there was insufficient evidence to find that the respondent had custody and control of all the packages recovered from his room. Even if there was proof of custody and control, it would not be sufficient to establish possession. The prosecution had to establish beyond reasonable doubt that the respondent had not only custody and control but also knowledge of the drugs, but knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. (see *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113.

[16] The learned judge had not invoked the aid of the statutory presumption of knowledge under s. 37(d). Thus knowledge had to be proved either by direct evidence or circumstantial evidence. The testimonies of SP4 and SP6 showed that the drugs were discovered as a result of "soal siasat" of the respondent. It was contended by the DPP that this showed that the respondent had knowledge of the drugs in the room. However we were of the considered view that knowledge of the place where the drugs were lying hidden did not necessarily constitute possession by the respondent unless there was further evidence produced by the prosecution that it was the respondent who had hidden the drugs there. At the most it showed that he had knowledge where the drugs were kept or concealed. In the case of *Yee Ya Mang v. PP* [1971] 1 LNS 156 Sharma J said:

> When, however, the accused without stating that he had concealed those articles merely produces them from a place to which other people could have access, it would not be sufficient to establish his possession even though the articles may be found carefully concealed and hidden because that is quite consistent with any other person having done so and the accused might merely have knowledge of it. In the absence of any incriminating statement made by the accused leading to the discovery of the articles, their production alone from another man's land cannot be sufficient to establish the accused's possession. It may at the most show his knowledge that the articles were concealed there.

[17] We had perused the evidence and found that it did not show what was the true substance of the information given by the respondent to SP4. There was no clear evidence that SP4 had recovered the drugs because the respondent had told him that he had hidden the drugs in the room. Thus we find that there was a doubt whether the respondent had custody and control of the drugs and he had concealed them in the room or whether he merely had knowledge of the presence of the drugs in the room (see *PP v. Khoo Boo Hock & Anor* [1990] 1 CLJ 971; [1990] 2 CLJ (Rep) 716; *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ Rep 265 SC; *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ Rep 43).

[18] It is trite law that the court need not be convinced of the defence story to entitle the accused to an acquittal. The burden of proof on the accused is indeed a light one which is merely to cast a reasonable doubt on the prosecution's case. Having perused the evidence we find that the defence raised by the respondent was reasonable and probable and sufficient enough to rebut the presumption under the DDA. For the reasons stated we agreed with the learned judge and affirmed His Lordship's decision to acquit and discharge the respondent of the offence of trafficking.